
(2009) 04 KAR CK 0120

Karnataka High Court

Case No: Sales Tax Appeal No. 35 of 2009

R.C. India

APPELLANT

Vs

The State of Karnataka

RESPONDENT

Date of Decision: April 3, 2009

Acts Referred:

- Karnataka Sales Tax Act, 1957 - Section 10 (2), 10 B, 22 A (1)

Citation: (2009) 26 VST 674

Hon'ble Judges: Manjula Chellur, J; B.V. Nagarathna, J

Bench: Division Bench

Advocate: M.N. Shankare Gowda, for the Appellant; Geetha Menon, AGA, for the Respondent

Final Decision: Dismissed

Judgement

Manjula Chellur, J.

The appellant herein is one M/s. R.C. India represented by its partners Sri. Nijalinge Gowda.

2. The brief facts that have led to the filing of the present appeal are that the appellant is a partnership firm constituted for carrying on the business of excavating and sale of rough granite blocks. The Deputy Commissioner of Commercial Taxes (Transition-31) - the assessing authority of the appellant relying upon the investigation and inspection report from the Joint Commissioner of Commercial Taxes (Vigilance) Bangalore, estimated the turn over of the appellant for the assessment year 2000-01 at Rs. 9,62,390.00 with rate of tax at 12%.

3. Aggrieved by the same an appeal was preferred before the Joint Commissioner of Commercial Taxes (Appeals-1), in KST AP. No. 33/2008-09 and the same was allowed on 26.05.2008.

4. Subsequently, the Additional Commissioner of Taxes, Zone 1, Bangalore, issued a notice u/s 22A(1) of the Karnataka Sales Tax Act proposing to revise the order of appeal on the ground that the order of the appellate authority was erroneous and was prejudicial to the interest of the revenue. She appellant filed a reply to the said notice. The revisional authority however, confirmed the proposals made in the said notice. Aggrieved by the said order of the provisional authority dated 04.02.2009 the present appeal is filed.

5. It is contended on behalf of the appellant assesses that it being a license holder, it was paying royalty on its business of extracting or excavating rough granite to the Deputy Director, Department of Mines and Geology,. Kanakapura. According to the appellant it had entered into an agency agreement with M/s. Prabhath Granite Pvt. Ltd., No. 18, K.H. Read, Bangalore - 27 and appointed M/s. Prabhath Granite Pvt. Ltd. as its agent. Therefore, M/s. Prabhath Granite Pvt. Ltd. as agent of the appellant was extracting and selling granite blocks from the quarry over which the appellant had licence. As per the terms and conditions of the agency agreement, M/s Prabhath Granite Pvt. Ltd. had exclusive right to procure orders and also had a right to make cash sales as well as credit sales. The entire responsibility of selling was with M/s. Prabhath Granite Pvt. Ltd. and the prices had to be fixed by the principal, i.e. the appellant. All the expenses were to be born by M/s. Prabhath Granite Pvt. Ltd. and it was entitled for commission. It was also the duty of M/s. Prabhath Granite Pvt. Ltd. to pay taxes and duties which had to be reimbursed by the appellant the principal. On termination of the agency agreement, M/s. Prabhath Granite Pvt. Ltd. was to return unsold goods to the principal and in turn receive the security money deposited with the appellant.

6. According to the appellant, the appellant was not able to bring to the notice of the assessing authority the said agreement in the year 2008 at the time of assessment on two counts, firstly the appellant had totally forgotten the existence of the agreement and secondly the relationship between M/s. Prabhath Granite Pvt. Ltd. was completely strained till the end of 2004-05. Said M/s. Prabhath Granite Pvt. Ltd. had the agreement with it. As a matter of fact, the sale consideration from the buyers of granite was not even paid to the appellant. Ultimately, the agency was terminated in the end of 2005. However, the relationship was strained till 2007.

7. According to the appellant, only when he received, the proposition notice to treat the transaction of M/s Prabhath Granite Pvt. Ltd. as the sales turn-over at the hands of the appellant, the appellant rushed to M/s. Prabhath Granite Pvt. Ltd. requesting them to help out the appellant. Accordingly, M/s. Prabhath Granite accepted that rough granite blocks were extracted and transported for sale by them from Achalu mining area in survey No. 53, Kanakapura Taluk, over which the appellant had licence. A certificate was issued on 10.12.2007 for the assessment year 2000-G1 to 2004-05. Declaration Form 39 was also used according to M/s. Prabhath Granite Pvt. Ltd. As the appellant totally forgot to mention the existence of agency agreement,

there was confusion which led to the filing of the present appeal.

8. According to the appellant, M/s Prabhath Granite Pvt. Ltd. being the agent of the appellant is liable to be assessed for payment of tax and not the appellant as M/s. Prabhath Granite Pvt. Ltd. was the agent of the principal, i.e. the appellant. It is further contended, the revisional authority was wrong in rejecting the finding given by the assessing authority to the effect that M/s. Prabhath Granite Pvt. Ltd. had extracted, transported and sold the rough granite blocks by using Form 39. Appellant contends, the appellate authority was right in concluding that the assessing authority ought to have re-assessed the appellant u/s 12A of the K.S.T. Act instead of assessment u/s 12(3) of the K.S.T. Act. It is submitted that, the revisional authority was not justified in concluding that appellant had sold the entire granite to M/s. Prabhath Granite Pvt. Ltd. and it is not the agent; that the revisional authority was not justified in holding the agency agreement as a created document. Therefore, it has wrongly treated the appellant as the first seller of rough granite blocks and has taxed erroneously. The revisional authority has no jurisdiction to estimate the turn over of the stones in the revisional order without proposing the same in the notice. The revisional authority stepped into the shoes of the assessing authority and reassessed the whole thing which is contrary to the procedure. When once the order of the appellate authority is set aside even the levy of penalty vanishes. Therefore, levy of penalty u/s 12(4)(b) of the Act in the revisional order was not justified.

9. learned Counsel for the appellant relies on the decision of this Court in Shankar Construction Co. v. Additional Commissioner of Commercial Taxes, Belgaum Zone, Belgaum reported in STC Vol. 124 page 265 in order to contend that the justification for the proposal of revision and the possible lines on which it is contemplated should be set out in the show cause notice.

10. We have perused the orders of the three authorities in question.

11. As per the inspection report, the assessing officer found till the activity was brought to light by way of detection by the investigation wing of the Department, the assessee has neither obtained nor sought for registration under the provision of the KST Act. Therefore, having regard to the fact that there was taxable turn over, the appellant firm was deemed to be a registered dealer u/s 10B of the KST Act. The investigation report gave details of the excavation and extraction of rough granite blocks for the year 2000-01 as per the information from Department of Mines and Geology. The call notice served on the dealer was replied. The account books produced reflect the sales of rough granite blocks only at Rs. 1,20,690/-. Best judgment assessment was done after taking into consideration expenditure inevitably required to be incurred. The assessing authority taking into consideration the contention of the appellant that M/s. Prabhath Granite Pvt. Ltd. was its agent, went into the details and found that M/s. Prabhath Granite Pvt. Ltd. had transported rough granite blocks by using form No. 39 declarations. So far as the appellant

assessee is concerned, it held that the assessee has not maintained proper books of accounts and has not paid the tax and cannot ask for reasonable estimation and ultimately assessed the turn over and arrived at Rs. 1,32,810/- as the tax payable.

12. When the appeal was filed, the appellate authority held that the assessing authority ought to have initiated proceedings u/s 12A and not u/s 12(3) of the Act. It further held that the assessing authority was not justified in arriving at the sales turn over based on probable expenses incurred for extracting stones - like machinery hire charges when all the information was available on record. According to the appellate authority, the assessing authority ought to have established whether the appellant had extracted the stones or authorised somebody to extract the same and held that the assessing authority failed to establish who has paid royalty for all the years and also failed to establish the aspect of removal of stones and then selling the same to M/s. Prabhath Granite Pvt. Ltd. by the appellant and ultimately held that, the stones extracted and sold were accounted by M/s. Prabhath Granite Pvt. Ltd. as an agent and not as a first purchaser.

13. The revisional authority sent notice u/s 22A(1) of the Act on the ground that there was evidence that appellant assessee had not filed the monthly statements and returns and Section 12 covers not only registered dealer but every dealer who is liable to get himself registered u/s 10(2) of the Act. He also opined that the assessment u/s 12(3) was correctly passed as Section 12A deals with assessment of escaped turnover under certain circumstances as mentioned in the said provision. In para 4 of the revisional authority's order, the revisional authority has discussed in detail why the appellate authority was not justified in setting aside the assessment order and reference to the xerox copy of the agency agreement is also made,

14. From the records it is seen that at no point of time, the agency agreement was brought to the notice of either the assessing authority or the appellate authority. It was produced for the first time at the stage of revision. The revisional authority has properly arrived at the conclusion that the appellate authority was not justified in concluding that M/s. Prabhath Granite Pvt. Ltd. had accounted on behalf of the assessee. The assessee as partnership firm is an independent concern and has to account for tax independently and separately from any other dealer who might have purchased the goods. The agency document was not placed before the appellate authority and the appellate authority without even verifying whether such document was in existence or not, had opined that M/s. Prabhath Granite Pvt. Ltd. was extracting the granite as an agent of the appellant assessee. In order to accept this document as a genuine document, several aspects have to be considered. We have also perused a copy of the Agency agreement dated 1.2.2000 between the assessee and M/s. Prabhath Granite Pvt. Ltd. The purpose of the agreement is for extracting and selling granite blocks for a period of 5 years from the date of execution of the said agreement. Clause's of the agreement reads as follows:

That the Agent shall have the exclusive right to procure orders from customers. The Agent shall not have any right to make any representation in the trade.

15. The fact that the agent has been termed as "sole selling agent" prima facie means that the granite extracted became the exclusive right of the agent i.e., M/s Prabhath Granite Pvt. Ltd. The manner in which M/s Prabhath Granite Pvt. Ltd. acquired exclusive right and title to deal with the granite blocks is not forthcoming from the said agreement. In business parlance sole selling agent has the exclusive right to the product for which the agency is created and the said products are obtained by payment of consideration, in which event he would be a sole selling agent who in turn would have the right to dispose of the products to various purchasers. Though the agreement is an interested agency agreement, in our view, in substance it is a sale of the granite blocks by the appellant to M/s. Prabhath Granite Private Limited.

16. No material indicating compliance of the terms and conditions of the alleged document like payment of security deposit and amount of commission paid, etc. are forthcoming. In the balance sheet produced by M/s. Prabhath Granite Pvt. Ltd. for the relevant years there is no indication of commission business being carried by the said concern for the appellant assessee. Both the parties were required to declare the income from such agency transaction before the income tax authorities but such material is not forthcoming. The revisional authority was therefore, justified in coming to conclusion that the said document was created at the stage of revision only to avoid tax consequences.

17. At para 5 of the order, the revisional authority has in detail discussed how the appellate authority was not justified in setting aside the order of assessment. The revisional authority was justified in saying that the present assessee being an independent partnership firm had to maintain proper accounts for the payment of royalty, commission, etc. and in the absence of agency agreement before the appellate authority, the appellate authority had no basis or foundation to arrive at a conclusion in favour of the appellant. The plea of agency between the assessee and M/s. Prabhath Granite Pvt. Ltd. was rightly rejected as it amounts to creation of a document to evade payment of tax and penalty, that too at the stage of revision.

18. The revisions authority was justified in saying that the assessment concluded u/s 12(3) of the Ant r/w Section 18(3) was correct as it was not a case of escapement of turn over to which Section 12A is attracted. Escapement of turn over would come into picture only if there is already a concluded assessment, for example if a particular turn over is not accounted for on account of default of the assessee, then it can be termed as escapement of turn over. If for the first time assessment of turn over is taken up as it was not at all declared by an unregistered dealer, it would not attract Section 12A.

19. In the present case, question of re assessment did not arise as there was no original assessment, therefore, he was deemed as a registered dealer u/s 10B of the Act. The revisional authority is justified in opining that, to the present case Section 12(3) r/w Section 18(3) would apply and not Section 12A. Therefore, he was justified in holding that the order of the appellate authority was illegal, as well as prejudicial to the interest of the revenue.

20. Learned Counsel for the appellant relied upon the decision of the Division Bench of this Court in Shankar Construction Company's case referred to supra, to contend that the notice issued in the instant case by the revisional authority was not valid and not in accordance with law, as the notice had virtually concluded the matter. In the said decision the revisional authority had issued show-cause notice which indicated to the assessee that he proposed to "revise" the assessment and "conclude" the same. The Division Bench held that by use of the said phraseology, the revisional authority had prejudged the issue and the same was contrary to the whole purpose of issuing the show-cause notice.

21. We do not see how the said decision is of any assistance to the appellant in as much as the show-cause notice issued by the revisional authority in this case merely states the reasons or the basis on which the revisional authority intends to re-open the order passed by the Appellate Authority. Further, an opportunity was given by the revisional authority to the appellant to file objections and after hearing the appellant, the impugned order was passed by the revisional authority. The basis for intending to re-open the order passed by the Appellate authority would not mean that the revisional authority has concluded the matter, on the other hand, it is necessary that the notice issued by the revisional authority must indicate the reasons for issuing such a notice or otherwise, the assessee would not be in a position to reply to the show cause notice.

22. With regard to assessment is concerned, the revisional authority was justified in opining that the assessing authority had erred in assessing the assessee at lower turn-over and therefore he directed the assessing authority to issue revised demand notice as indicated in the proposition notice of the revisional authority. It is also found that the assessee did not dispute the said proposal except the liability in terms of the alleged agency agreement.

23. The authority was also justified in saying that there is violation of Section 12B(1) for having transacted the business in taxable goods without registration and payment of taxes. Imposition of penalty equally applies to deemed registered dealer also. Therefore, the authorities were justified in imposing penalty as well. As a matter of fact, throughout the proceedings, at no point of time the applicability of any of the above provisions were questioned by the assessee. The only dispute was with regard to alleged agency agreement by contending that M/s. Prabhat Granite Pvt. Ltd. has transacted the business on behalf of the appellant assessee. The revisional authority was justified in holding that the so called agency agreement is a

created and got up document for the purpose of evading payment of tax and penalty. We do not find any good ground to interfere with the orders of the revisional authority.

Accordingly, the appeal is dismissed.